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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

BEFORE THE

Federal Communications Commission

WASHINGTON, D.C.

In the Matter of 1998 Biennial Regulatory Review -- Spectrum Aggregation Limits For Wireless Telecommunications Carriers	)	WT Docket No. 98-205
Cellular Telecommunications Industry Association's Petition for Forbearance From the 45 MHz CMRS Spectrum Cap	)	
Amendment of Parts 20 and 24 of the Commission's Rules -- Broadband PCS Competitive Bidding and the Commercial Mobile Radio Services Spectrum Cap	)	WT Docket No. 96-59
Implementation of Sections 3(n) and 332 of the Communications Act: Regulatory Treatment of Mobile Services	)	GN Docket No. 93-252

**COMMENTS OF
THE CELLULAR TELECOMMUNICATIONS INDUSTRY ASSOCIATION**

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COMMENTS OF THE CELLULAR TELECOMMUNICATIONS INDUSTRY ASSOCIATION

The Cellular Telecommunications Industry Association ("CTIA")[1] hereby submits its Comments in the above captioned proceeding.[2] CTIA applauds the Commission's efforts to reexamine the appropriateness of the 45 MHz CMRS spectrum cap. Consistent with its Petition

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[1] CTIA is the international organization of the wireless communications industry for both wireless carriers and manufacturers. Membership in the association covers all Commercial Mobile Radio Service ("CMRS") providers and manufacturers, including 48 of the 50 largest cellular and broadband personal communications service ("PCS") providers. CTIA represents more broadband PCS carriers and more cellular carriers than any other trade association.

[2] In the Matter of 1998 Biennial Regulatory Review -- Spectrum Aggregation Limits for Wireless Telecommunications Carriers, WT Docket Nos. 98-205, 96-59 and GN Docket No. 93-252, *Notice of Proposed Rulemaking*, FCC 98-308 (rel. Dec. 10, 1998) ("Notice").

for Forbearance ("Petition"),[3] CTIA supports the repeal of or forbearance from further enforcement of the CMRS spectrum cap in favor of case-by-case reviews of permissible levels of horizontal ownership of CMRS licenses based on the antitrust principles that apply to competitive markets.

I. INTRODUCTION AND SUMMARY

The Notice's determination to examine the continued efficacy of the 45 MHz CMRS spectrum cap reflects a sound policy decision. CTIA enthusiastically endorses the principles the Commission has pledged to follow in determining whether to eliminate or modify regulations such as the spectrum cap:

> First, we believe that trusting in the operation of market forces generally better serves the public interest than regulation. The Commission should consider imposition of regulation when there is an identifiable market failure and imposition of the regulation would serve the public interest because it is targeted to correct that failure. Even in those situations, the Commission should endeavor to craft narrowly any regulation to impose only the minimum restraint on the market necessary to achieve the public interest. Second, we seek to foster vigorous competition in all telecommunications markets. . . . In this regard, we wish to ensure that there are no regulatory impediments to the evolution of wireless carriers into more effective competitors vis-a-is the local wireline telephone companies. Third, we seek to secure the benefits of modern telecommunications services, including wireless services, for all areas of our Nation. . . . we see many indications that wireless technology has a significant role to play in serving under-served and high-cost areas. Finally, we wish to ensure that our regulation promotes, rather than impedes, the introduction of innovative services and technological advances.[4]

CTIA believes that the Commission generally should trust in market forces. Interference with the market is only appropriate where there is identifiable market failure, and such interference should

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3 Petition for Forbearance of the Cellular Telecommunications Industry Association (filed Sep. 30, 1998).

4 Notice at ¶ 5.

be minimally-intrusive. The Commission should remove obstacles to wireless carrier development so that vigorous competition in all segments of the telecommunications market are fostered. The Commission also should recognize the significant role that wireless has in providing wireless services to rural areas. Finally, the Commission should ensure that its regulation does not sacrifice technological innovation.

Consistent with these stated principles, further enforcement of the CMRS spectrum cap is no longer appropriate given current competitive market conditions and the availability of less restrictive means to meet legitimate Commission regulatory objectives. The Commission should forbear from further enforcement of the cap or repeal it completely. It would be patently inappropriate, though, for the Commission to maintain the status quo.

An inflexible, stringent cap on spectrum is no longer necessary in today's market. It is tantamount to a cap on capacity, and a damper on competition. Now that auctions are nearly completed, reliance upon an artificial limitation on capacity is unnecessary. Such caps on capacity impose inappropriate costs, and may impair wireless carriers' ability to provide services competitive with the local exchange and to provide advanced third generation ("3G") wireless services with existing spectrum allocations. The Commission has tangible, more effective alternatives available, including its Section 310(d)[5] license transfer authority, as well as reliance upon the Federal antitrust laws. Given that transfer issues for both the Commission and antitrust authorities are decided on a case-by-case basis anyway, reliance upon such alternatives poses no significant additional burdens, either for carriers or regulators.

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[5] 47 U.S.C. § 310(d). See Notice at ¶ 73.

In its Petition for Forbearance ("Petition"), CTIA laid the legal foundation necessary for the Commission to forbear from enforcing the 45 MHz CMRS spectrum cap. These Comments address specific market issues raised by the Commission in the Notice. The analysis provided herein, in the Petition, and in the accompanying Appendix[6] to the Petition is directly germane to a Commission decision either to forbear or to repeal the 45 MHz CMRS spectrum cap.[7]

II. THE 45 MHZ CMRS SPECTRUM CAP IS NOT NECESSARY TO ENSURE JUST AND REASONABLE OR REASONABLY NONDISCRIMINATORY CARRIER PRACTICES.

A. Competition Will Ensure Appropriate Carrier Conduct.

A spectrum cap is simply not needed to ensure that carriers engage in just, reasonable and nondiscriminatory conduct. As CTIA observed in its Petition,[8] the CMRS industry is competitive. These competitive forces provide a sufficient market check on CMRS carrier rates and practices.

To the extent that competitive forces do not foreclose all unreasonable or discriminatory carrier conduct, the Commission need not resort to a spectrum cap for an appropriate remedy. The Commission recently found that the first prong of the Section 10 statutory forbearance test "essentially tracks the central requirements of sections 201 and 202."[9] Sections 201 and 202 --

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6 Stanley M. Besen and William B. Burnett, Charles River Associates, "An Antitrust Analysis of the Market for Mobile Telecommunications Services" (December 8, 1993) ("Besen and Burnett").

7 CTIA would not object were the Commission in this proceeding to repeal the cap, as opposed to forbearing from further enforcement. The appropriate regulatory outcome is the removal of the bright-line, inflexible spectrum cap. The means used, whether forbearance or outright repeal, are of secondary importance. The record developed in favor of forbearance would fully support any administrative law standards for repeal.

8 Petition at 7-9.

9 Personal Communications Industry Association's Broadband Personal Communications Services Alliance's Petition for Forbearance for Broadband Personal Communications

core common carrier provisions -- will remain applicable to all CMRS carriers[10] in the absence of a spectrum cap. Thus, the Commission can ensure just, reasonable, and nondiscriminatory practices on the part of CMRS carriers -- without reliance upon a CMRS spectrum cap.[11]

B. Concerns Regarding Unilateral Exercise of Market Power and Collusive Practices Can Be Addressed Without Resort To A Spectrum Cap.

As CTIA noted in its Petition, the Commission's underlying concern in adopting a spectrum cap was, among other things, to guard against excessive market power and to avoid undue concentration of licenses.[12] CTIA addresses these concerns below. In short, these concerns are no longer significant enough to warrant retention of the 45 MHz CMRS spectrum cap.[13]

Services; Biennial Regulatory Review - Elimination or Streamlining of Unnecessary and Obsolete CMRS Regulations; Forbearance from Applying Provisions of the Communications Act to Wireless Telecommunications Carriers. . ., WT Docket No. 98-100, GN Docket No. 94-33 and MSD-92-14, *Memorandum Opinion and Order and Notice of Proposed Rulemaking*, 13 FCC Rcd 16857, at ¶ 19 (1998) ("PCIA Forbearance Order and NPRM").

10 Id. at ¶ 4 ("we decline to forbear from applying sections 201 and 202" to broadband PCS providers).

11 The Commission has relied upon its residual authority under Sections 201 and 202, 47 U.S.C. §§ 201, 202, as a basis to find that forbearance is appropriate. See Implementation of Sections 3(n) and 332 of the Communications Act, GN Docket No. 93-252, *Second Report and Order*, 9 FCC Rcd. 1411, at ¶ 176 (1994) ("Compliance with Sections 201, 202, and 208 is sufficient to protect consumers [from the absence of CMRS tariffs]. In the event that a carrier violated Sections 201 or 202, the Section 208 complaint process would permit challenges to a carrier's rates or practices . . .") ("CMRS Second Report and Order").

12 Petition at 9-10; see Notice at ¶ 10.

13 In Section IV.C., infra, CTIA will address regulatory alternatives to the spectrum cap.

Unilateral Exercise of Market Power: Under antitrust law, a single firm is not considered to have even the theoretical ability to exercise its unilateral power to raise price (i.e., market power) unless it achieves a minimum level of concentration. As CTIA noted in its Petition, the Merger Guidelines establish a 35 percent market share as the absolute minimum for unilateral exercise of market power even if all other factors point to the probability of the existence of such power.[14] Even then, antitrust case law and the Merger Guidelines reject automatic prohibitions based on market share in favor of case-by-case analysis that requires the examination of other factors to determine whether a given level of concentration is likely to produce anticompetitive effects. Such an approach avoids the distinct probability that an automatic cutoff would prevent mergers that have substantial benefits.[15]

Under the 45 MHz cap, a controlling shareholder is limited to a market share of 26.5 percent (i.e., 45 MHz) -- a percentage well below the 35 percent threshold recognized to be necessary for undue market power.[16] Where the benefits are limited and the costs high, as is the case here, the Commission should elect a less severe ownership restriction.[17]

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14 Petition at 12; see U.S. Department of Justice and Federal Trade Commission Horizontal Merger Guidelines, § 2.211 (Apr. 2, 1992) ("Merger Guidelines"). The Merger Guidelines were recently revised to reflect the importance of efficiencies in merger analysis. See 1992 Merger Guidelines, with April 8, 1997, Revisions to Section 4 on Efficiencies, available on the FTC's Internet Home Page: <http://www.ftc.gov/bc/docs/horizmer.htm>.

15 This percentage is consistent with the Supreme Court's determination in Jefferson Parish Hospital v. Hyde, 466 U.S. 2, 46 (1984) (plurality opinion), that a firm with a market share of less than 30 percent cannot possess market power.

16 The 26.5 percent figure is derived from the "worst case" scenario where the available mobile telecommunications spectrum is limited to 170 MHz (45/170 = 26.5). The 170 MHz includes 120 MHz allocated to broadband PCS and 50 MHz allocated to cellular services. No adjustments have been made to reflect capacity increases associated with the

Collusive Practices: In addition to the unilateral exercise of market power, there exists, as the Merger Guidelines discuss at length, the danger of increased prices or decreased output through express or tacit collusion among competitors which may be enhanced by increased market concentration. However, an extensive analysis by Besen and Burnett[18] demonstrated that the threshold concentration levels posited by the Merger Guidelines as likely to lead to an enhanced opportunity for collusion are unlikely to be met in the mobile telecommunications services market[19] even if the Commission substantially relaxed its proposed limitations on ownership of CMRS spectrum. In addition, even if these concentration levels are reached, other industry factors relevant to the mobile telecommunications services market, including: (1) rapid technological progress; (2) an increased demand for mobile services; (3) the heterogeneous nature of potential services; and (4) an expanding fringe of smaller firms (e.g., SMRs, satellite providers), render collusion among CMRS providers unlikely.[20]

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adoption of digital technologies or to account for other competitive services such as enhanced SMR.

17 See Motor Vehicle Mfr. Ass'n of the United States, Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 54-55 (1983).

18 See Besen and Burnett at 35-49.

19 As Besen and Burnett note, "collusive behavior is generally believed to be less likely in industries, like mobile telecommunications service, where a significant portion of a firm's costs must be incurred regardless of the level of its output, i.e., when fixed costs are high relative to variable costs." Id. at 53.

20 See Merger Guidelines §§ 1.521, 2.1; Besen and Burnett at 49-55. As Besen and Burnett note, "[i]f market conditions are changing rapidly and are expected to continue to change rapidly in the future, the very fact of this market dynamism may prevent firms from coordinating their behavior and prices. In such circumstances, which are present in the mobile telecommunications market, even high levels of concentration may be acceptable, especially where economies of scale or scope permit larger firms offering a wider array of products or services to experience lower costs." Besen and Burnett at 8.

Notably, many CMRS carriers have expended significant resources in recent months to build out their networks. In these situations, such firms may have excess capacity that permits them to increase their output in the near term while incurring relatively few additional costs. Under such circumstances, this is "precisely the situation in which economic analysis indicates that vigorous price competition is most likely, and that collusion is unlikely."[21]

Moreover, in cases of relatively small partial overlaps of CMRS licenses, Section 202 nondiscrimination requirements provide a useful check on collusive behavior.[22] Section 202 can foreclose collusive carrier practices such as anticompetitive price discrimination. To illustrate, in examining the Commission's 10 percent overlap restriction (which limited cellular companies from holding a 30 MHz PCS MTA license in areas of overlap), Besen and Burnett noted that so long as a firm cannot price discriminate among customers in different BTAs, then cellular carriers with a 55 MHz allocation in a limited geographic area cannot "exercise market power because such a firm, either acting alone or in concert with other firms, would not be able profitably to raise prices."[23]

Partial Ownership Interests: In acquisitions conveying less than control, arguably the Commission has a legitimate interest in ensuring that such partial ownership interests do not

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21 Id. at 54.

22 That is, a carrier's obligation not to engage in unreasonable discrimination in its license area effectively limits its ability to affect competition in a small geographic area.

23 Besen and Burnett at 58. Besen and Burnett further noted that bars against price discrimination also ensure that "apparently captive customers [customer equipment usable only on a particular licensee's network] can face competitive prices. This arises because providers who compete for new customers must offer the same favorable terms to continuing ones." Id. at 22.

impair competition. For example, the Commission may be concerned about unilateral effects that a partial interest can have on the licensee; i.e., a licensee may change its behavior because of the partial ownership interest held by a competitor. Notwithstanding these concerns, a spectrum cap is not necessary to prevent such potentially unreasonable or discriminatory carrier practices.

The Commission's previous determinations regarding ownership attribution for purposes of the spectrum cap are instructive in this case. Even under the Commission's rules, not all partial ownership interests implicate competitive concerns. Those interests should no longer be considered relevant were the Commission to remove the spectrum cap. For example, under the attribution thresholds accompanying the 45 MHz CMRS spectrum cap, stock ownership interests of less than 20% are not considered cognizable.

Moreover, the Commission permits the adoption of management agreements without prior approval so long as they do not confer control from the licensee to the manager. The Commission, with the United States Department of Justice's approval,[24] also does not attribute management agreements for purposes of the spectrum cap unless they permit a party other than the licensee to make decisions regarding service offerings or price.[25] To the extent that a partial interest does not affect price or output, there should be no need for further scrutiny on the Commission's part. Partial interests affecting price or output could be considered more effectively under a "quick look" antitrust analysis -- as opposed to reliance upon a spectrum cap.

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24 See Ex Parte Comments of the United States Department of Justice, in GN Docket No. 93-252, at 3-4 (filed Sept. 26, 1994).

25 Notice at ¶ 14.

In short, none of the possible anticompetitive effects identified herein raises sufficient concern such that reliance upon a restrictive spectrum cap is still warranted.

III. THE 45 MHZ CMRS SPECTRUM CAP IS NOT NECESSARY FOR CONSUMER PROTECTION.

Of primary import, the Commission should recognize that the consumer protection element of the Section 10 forbearance test is not implicated by the 45 MHz CMRS spectrum cap in a direct way. The spectrum cap is an intermediate device. It protects consumers by protecting competition. Since, as noted, the cap is no longer necessary to protect competition, removing it will not have an adverse effect on consumers.

The fact that consumer protection issues are not directly implicated by the spectrum cap does not mean, though, that a record for forbearance cannot be established. It merely means that the evidentiary submission in favor of forbearance need not go to extreme lengths in an effort to prove that consumers are not harmed by removal of the 45 MHz CMRS spectrum cap.

Under similar circumstances, the Commission has relied upon competitive forces to support regulatory forbearance,[26] a clear recognition of the Commission's conclusion that consumers would not be left unprotected if a market is workably competitive. In the Commission's first decision exercising its statutorily-granted forbearance authority, the promise of competitive market conditions alone was sufficient to remove relatively significant statutory burdens such as tariff and Section 214 filing obligations from all CMRS carriers.[27] That is, while

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[26] CMRS Second Report and Order, at ¶ 136 ("the most prudent approach for us to follow in reaching decisions regarding forbearance in this Order must involve an examination of the prevailing climate of competition with respect to each of the various mobile services comprising the CMRS marketplace.")

[27] Id. at ¶ ¶ 173-182.

certain segments of the CMRS market had numerous competitors (such as paging), at the time cellular service was the primary source of mobile voice communications, and PCS was not yet operational. Yet the existing competitive conditions coupled with the promised entry of additional facilities-based competitors persuaded the Commission to take a forward-looking approach.[28]

The Commission's first exercise of its statutorily-granted forbearance authority in 1994 is similar in many respects to the relief requested here. As with issues of forbearance from tariff filing requirements, no values apart from competition were directly implicated. To the extent that the Commission desires to promote other values, there remain separate bases in the Communications Act of 1934, as amended, and the rules that will not be affected by lifting the spectrum cap, for example, eligibility criteria for Broadband PCS C and F Block licenses.[29]

More recent Commission forbearance decisions superficially appear less impressed with market developments, instead emphasizing consumer protection and other public interest values over competition.[30] This appears to be in direct contrast with the pro-market and pro-competition

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28 While this first decision involved the Commission's exercise of its forbearance authority under Section 332, 47 U.S.C. § 332, the Section 10 test for forbearance is essentially identical. Only the scope of Section 10 differs from 332. PCIA Forbearance Order and NPRM at ¶ 114 ("Section 332(c) and section 10 differ in scope, yet set forth similar three-pronged tests that must be met in order for us to exercise our forbearance authority.").

29 CTIA explored in some depth the Commission's original purpose in adopting the CMRS spectrum cap. Petition at 9-12. To some extent, it involved concerns about distributional effects, making valuable resources available to all rather than only to favored segments of society. The Broadband PCS C & F Block ownership limits directly, but the spectrum cap as well in a less direct fashion, were influenced by a desire to affect resource distribution and to ensure fairness.

30 See, e.g., PCIA Forbearance Order and NPRM at ¶ ¶ 23-24. The strict application of the forbearance test in PCIA was affected by the actual provisions under consideration for forbearance -- the core common carrier provisions Sections 201 and 202. Id. at ¶ 29.

statements made in this Notice.[31] More fundamentally, these values are not at risk in the proposed elimination of the spectrum cap. To illustrate, despite the Commission's concern,[32] there is no reason to believe that rural areas will be adversely affected by lifting the CMRS spectrum cap. Buildout is a competitive issue. That is, CMRS license buildout is accomplished in response to perceived demand for services and the cost to supply such services. As long as the Commission retains minimal buildout obligations for CMRS carriers,[33] then there should be geographic extensions of service to most of the population. Of significant importance, if the Commission does not interfere with a carrier's ability to achieve service at lower costs, then carriers have greater ability to offer service profitably and every incentive to make services more widely available. From the perspective of geographic coverage, a decrease in a carrier's costs generally will mean an increase in service availability. Were the government to impose material costs on carriers through regulation, these increased costs generally would decrease the area and the number of the people served. This is the very reason why the Commission should be reticent in imposing any unnecessary regulatory costs upon carriers such as a spectrum cap. It risks raising the costs for everyone and can have the perverse effect of limiting the geographic reach of

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Elimination of these requirements would sweep considerably more broadly than the elimination of the spectrum cap.

31 Notice at ¶ 5.

32 Id. at ¶ 76.

33 See, e.g., 47 C.F.R. § 24.203(a) (construction requirements for broadband PCS licensees of 30 MHz licenses to serve two-thirds of the population in their service area within 10 years of being licensed).

CMRS systems -- especially to the rural areas of concern to the Commission. In those situations, application of the spectrum cap may hinder innovative service offerings.[34]

In some extremely rural areas, the incumbent cellular carrier may be the only CMRS provider willing to offer digital PCS services. If a PCS licensee determines that it is not economically feasible to provide service in the area, consistent with the Commission's spectrum disaggregation policy and geographic partitioning rule, the PCS licensee may elect to focus its activities and seek to transfer unneeded spectrum in these rural areas. It may be more cost effective in these areas for the cellular carrier to offer digital PCS because the fixed costs associated with erecting and maintaining tower sites, and the dedicated circuits needed to link these sites to the CMRS licensee's switch, can be shared.[35]

In summary: to the extent that the second prong (and the first prong, for that matter) of the Section 10 forbearance test is concerned with direct dealings with consumers, then a different analysis is required. The cap as it relates to consumers is all about competition, and nothing more. As CTIA noted in its Petition, the CMRS market, according to the Commission's

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34 Congress apparently applied similar reasoning -- maximizing scope economies -- in exempting cable operators and local exchange carriers in rural areas from the general prohibition against buyouts of cable systems by local exchange carriers (and vice versa) in overlapping service areas. 47 U.S.C. § 572(d)(1).

35 For much the same reason, i.e., sharing fixed costs, in many rural localities one provider offers numerous "brands" that typically are sold separately in more densely populated markets. For example, in rural America, car dealerships represent multiple brands and manufacturers under one roof, whereas these brands are sold by separate dealerships in urban markets.

standards, is competitive.[36] These competitive forces within the CMRS market will secure the results anticipated by the Section 10[37] forbearance test.

IV. FORBEARANCE FROM ENFORCING THE 45 MHZ CMRS SPECTRUM CAP IS IN THE PUBLIC INTEREST.

Under Sections 10(a)(3) and 10(b), the Commission must determine whether forbearance is in the public interest and in so doing must consider whether forbearance will promote competitive market conditions.[38] The Commission has noted that in making this assessment, it "may consider the benefits a regulation bestows upon the public along with any potential detrimental effects or costs of enforcing a provision."[39] Specifically, the Commission has solicited demonstrations "whether the costs incurred by carriers to comply with particular provisions outweigh the benefits to the public" and "whether forbearance from particular statutory provisions would enhance future competition from a diversity of entities."[40] CTIA believes, consistent with the public interest test enumerated above, that forbearance from the spectrum cap promotes competitive market conditions and benefits the public.

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36 Petition at 7-9, 11.

37 47 U.S.C. § 160.

38 47 U.S.C. §§ 160(a)(3), (b); see Notice at ¶ ¶ 67-68.

39 PCIA Forbearance Order and NPRM at ¶ 27.

40 Id. at ¶ 115.

A. Given The Nature Of The CMRS Market, A Bright-Line, Inflexible Spectrum Cap Is Inappropriate.

When the CMRS spectrum cap was originally adopted in September of 1994,[41] most areas of the United States received mobile services from two cellular carriers. The Commission had not yet auctioned any broadband PCS licenses,[42] nor was it aware of the ultimate overwhelming success of the competitive bidding process as a means to assign licenses. As the Commission acknowledges, since 1994, the "CMRS market and the wireless telecommunications industry in general have changed considerably."[43] It is precisely these and other market changes that warrant elimination of the spectrum cap. While a cap may have been justifiable during the broadband PCS auction process, continued reliance at this stage in the competitive development of the CMRS market is clearly inappropriate, especially considering that today 157 million Americans have five or more CMRS carriers to choose from for mobile services.

The spectrum cap is simply too crude an instrument now that the auctions largely are concluded and in light of the fact, as explained below, that at least where transfers are involved the Commission and the antitrust authorities have to make individualized decisions anyway. A spectrum cap easily could interfere with new applications, including advanced data applications, and the rapid deployment of third generation ("3G") wireless. It could also inhibit the provision

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41 Implementation of Sections 3(n) and 332 of the Communications Act: Regulatory Treatment of Mobile Services, GN Docket No. 93-252, *Third Report and Order*, 9 FCC Rcd 7988 (1994).

42 Broadband PCS auctions did not commence until December 5, 1994. See FCC News Release, "FCC Grants 99 Licenses for Broadband Personal Communications Services in Major Trading Areas," (rel. Jun. 23, 1995).

43 Notice at ¶ 6.

of services competitive to the local exchange,[44] to the extent that such applications are capacity driven.[45]

As CTIA explained in its Petition, mere reliance upon an automatic market share threshold, i.e., a spectrum cap, paints an incomplete picture of the market. A spectrum cap limits the Commission's ability to take a multifaceted approach to market power issues, contrary to modern antitrust learning.[46]

To the extent that the purpose of the spectrum cap was based upon avoiding concentration at the outset, i.e., "to provide an expedited means of ensuring that multiple service providers would be able to obtain spectrum in each market and thus facilitate the development of competitive markets for wireless services,"[47] these concerns are now less heightened. The bulk of the broadband PCS licenses have already been awarded, but for certain licenses reserved specifically for auction to small businesses and entrepreneurs. At a similar stage in the cellular licensing process, the Commission removed the wireline/nonwireline ownership eligibility restrictions so that, for example, wireline carriers could own non-wireline (Block A) cellular licenses.[48]

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44 See Notice at ¶ ¶ 43, 46, 48.

45 While carriers are largely able to cluster geographically to provide service in an area comparable to that provided by a local exchange carrier, capacity constraints can act as a direct barrier to competition. Such applications may never evolve if adequate spectrum is not permitted to be acquired.

46 See Petition at 12-13.

47 Notice at ¶ 2.

48 See Applications of James F. Rill, Trustee for Comet Inc. and Pacific Telesis Group, for Consent to Transfer Control of Communications Industries, Inc.; Applications of Gencom, Inc./James F. Rill, Trustee and New Vector Communications, Inc. for Consent to Transfer

The CMRS market has witnessed radical technological advances and competitive developments -- notably without regulatory prompting. For example, the industry has transitioned from (1) car phones, to bag phones to pocket phones; (2) analog to several digital standards; and (3) voice applications to digital data delivery service. There is no reason to believe that lifting the CMRS spectrum cap will reverse or halt such market trends. Were this to happen, though, the Commission is not without effective recourse.

B. Case-by-Case Determinations Of Market Power and Market Concentration Are More Efficient.

Of fundamental importance, market concentration (or market share) alone is not a perfect proxy for market power. That is, a carrier can have an extremely high market share in a given market, yet have little or no market power.[49] Reliance upon concentration thresholds such as the Herfindahl-Hirschman Index ("HHI") employed in the Merger Guidelines does not portray an accurate picture of a carrier's ability to exercise market power.[50] The Commission's continued reliance upon HHI calculations as the principal justification for the retention of the CMRS

Control of San Diego Cellular, Inc., *Memorandum Opinion and Order*, 60 R.R.2d 583, ¶ 32 (1986) ("the wireline/nonwireline dichotomy is in large part an application processing tool, and to that extent the policy is satisfied by the issuance of construction permits to entities controlled by eligible parties").

49 Rajiv Chandrasekaran, Microsoft Trial Focuses on Question of Monopoly, Wash. Post, Jan. 6, 1999, at F1 ("high market share alone doesn't prove a monopoly. That's a long established principle of U.S. antitrust law: A company can control 100 percent of the market for chocolate-anchovy cookies, . . . but if anybody else has the ability to make similar cookies and distribute them, the original company doesn't have monopoly power.").

50 See Besen and Burnett at 33-35 (noting the trend of antitrust authorities and the courts moving away from heavy reliance upon market share and concentration thresholds in favor of a "rule of reason" analysis that incorporates numerous factors other than just market share).

spectrum cap is inappropriate.[51] Rather, the Commission must also consider other factors such as efficiencies, just as the Federal antitrust authorities do. This type of analysis particularly lends itself to case-by-case determinations.

The competitive nature of the CMRS market also lends itself particularly to case-by-case determinations of market power and market concentration. Simply stated, the dynamic, emerging nature of the CMRS market makes it difficult to conduct an antitrust analysis of the relevant market for mobile telecommunications service. The difficulties associated with making quantitative judgments regarding the CMRS market render reliance upon a *per se* cap inappropriate. In addition, the likely efficiencies associated with the removal of the spectrum cap also favor case-by-case determinations.

Product Market: As noted by Besen and Burnett, the relevant product market should include all firms that provide mobile telecommunications services, given that, among other things, providers legally are able rapidly to move among the provision of various services, and can do so at modest cost.[52] As the Commission has concluded, this would necessarily include all CMRS services currently considered under the cap: cellular, broadband PCS, and SMR.

Geographic Market: Using the methodology found in the Merger Guidelines, Besen and Burnett demonstrated that the appropriate geographic market for measuring possible

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[51] In 1996, the Commission determined that the CMRS 45 MHz spectrum cap was "a simplified version of the HHI, using spectrum capacity as the measurement of market share as it limits the amount of licensed spectrum capacity that any one person or entity may have." Amendment of Parts 20 and 24 of the Commission's Rules -- Broadband PCS Competitive Bidding and the Commercial Mobile Radio Service Spectrum Cap: Amendment of the Commission's Cellular/PCS Cross-ownership Rule, WT Docket No. 96-59 and GN Docket No. 90-314, *Report and Order*, 11 FCC Rcd. 7824, ¶ 96 (1996).

[52] Besen and Burnett at 14-23.

anticompetitive effects from increased concentration is also likely to be large.[53] This conclusion follows in part from the anti-discrimination requirements of Section 202(a)of the Communications Act.[54] Yet there is still the possibility for ambiguities. With the advent of services such as AT&T's "One Rate" nationwide wireless rate plan and several wireless carriers establishing services with national footprints,[55] the relevant geographic market is likely to become even larger.

Market Share: Determining the relevant market share of a wireless carrier has similar difficulties. To illustrate, merely counting customers as a measurement of market share would overstate the ability of cellular carriers to dictate price and output (service). With the advent of spectrum allocations for PCS, new capacity became available and new competitors were licensed. The PCS licensees are competing for existing mobile services customers and attracting new customers. Given current market penetration and the relative immaturity of the market, simply

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53 Besen and Burnett at 24-28.

54 The Commission has uniformly held that discrimination on a geographic basis is within the proscription of § 202(a) and hence illegal under the Act. See In re AT&T Communications, Tariff F.C.C. No. 15, Competitive Pricing Plan 22, 7 FCC Rcd. 4636 (1992); In re AT&T Communications, Revisions to Tariff F.C.C. No. 12, 4 FCC Rcd. 4932, 4938 (1989); Department of Public Services of Washington v. Pacific Telephone & Telegraph Co., 8 FCC 342 (1941). Courts have upheld the Commission's interpretation that § 202(a) prohibits all forms of price discrimination not based on cost-of-service differences. See, e.g., Western Union International v. F.C.C., 568 F.2d 1012 (2d Cir. 1977), cert. denied, 436 U.S. 944 (1978). The antidiscrimination requirements of Section 202(a), if enforced across broad classes of regions and products, will ensure broader product and geographic markets. Besen and Burnett at 14.

55 See Seth Schiesel, The Titans of Wireless Are Tearing Down Regional Fences, N.Y. Times, Jan. 11, 1999, at C1 (According to one market participant, "'[g]iven the way the market is moving, there is certainly virtue in having a national footprint, whether you achieve that through ownership or through partnership.").

counting the number of customers does not provide a complete picture of a carrier's market power.

Reliance upon a carrier's capacity to determine market share raises the same problems. Capacity is often an effective measurement of market share. Capacity, though, is not simply measured by looking to the amount of bandwidth assigned to a particular licensee. One of the determinants of capacity is technology, and different firms employ different types of digital wireless technology.[56] Given these complications, case-by-case determinations are well warranted.

In summary, there is no single quantitative measurement of market share. Qualitative judgments must be used, and they are less bounded because the market is not mature. This is a further reason why particularized judgments make better sense because market analysis is such a fact specific exercise.

Efficiencies: As CTIA noted above,[57] removal of the CMRS spectrum cap will promote efficient outcomes. Among other things, it will (1) permit carriers increased flexibility to provide service more efficiently in response to consumer demand, (2) ensure the continued deployment of advanced technologies and innovative services, and (3) allow carriers to position themselves more readily as local service competitors -- without sacrificing either the Commission's regulatory authority or its CMRS policy goals.

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[56] Besen and Burnett at 35-36. Moreover, cellular carriers have legacy analog customers and therefore are constrained to some degree in their deployment of high capacity digital wireless technology.

[57] See supra Section IV.A.

On the other hand, retention of the 45 MHz cap carries the distinct risk of decreasing dynamic efficiencies in the mobile services marketplace.[58] In the final analysis, arbitrary limits on CMRS ownership due to concerns about the undue exercise of market power should not amount to a needlessly strict "numbers game," ruling out an entire class of possible CMRS license combinations because some artificial boundary has been crossed.[59] The real danger is that innovation and economies of scope may be irretrievably lost by strict application of such rules.[60] For example, the deployment of 3G wireless services may be delayed if the Commission's rules fail to provide sufficient flexibility to accommodate additional spectrum requirements for these advanced applications.

Nor should the Commission rely upon "diversity of ownership" concerns as a basis for retaining the cap. The Commission has promoted diversity of ownership, consistent with Congressional intent,[61] through its licensing policies. This includes "designated-entity" set-asides

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58 Petition at 23-25. As CTIA also noted in its Petition, there are tangible costs, including opportunity costs, associated with the enforcement of the current automatic CMRS spectrum cap. Id. at 26.

59 See United States v. General Dynamics Corp., 415 U.S. 486 (1974).

60 See Merger Guidelines § 4; Besen and Burnett at 55-56.

61 See 47 U.S.C. § 309(j)(3)(B) (in designing auctions, the Commission shall "promot[e] economic opportunity and competition and ensur[e] that new and innovative technologies are readily accessible to the American people by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women") (emphasis added).

for small and rural businesses.[62] Congress, though, never intended for the Commission to foster the principle of CMRS ownership diversity at the expense of innovation and efficiency.

The Commission's concern that not all markets are experiencing the same number of PCS entrants,[63] does not provide a reason for retaining the cap. To the extent that there is any issue in rural areas, it stems not from concentration but from shortfalls in effective demand. As noted, the best remedy available to the Commission in that event is alleviating any unnecessary regulations that increase the cost of supplying rural areas.

In summary, consistent with its desire is to ensure that its "regulation promotes, rather than impedes, the introduction of innovative services and technological advances,"[64] the Commission should move to a case-by-case determination of CMRS horizontal ownership issues.

C. Both The Communications Act And The Federal Antitrust Laws Provide For Case-By-Case Review Of CMRS Ownership Acquisition Issues.

As noted above, the ideal regulatory approach is to judge spectrum combinations on a case-by-case basis taking into account all of the relevant variables bearing upon competition and efficiency, including the service area overlap, the relevant geographic market, the populations in the respective service areas, and the quantity of spectrum currently allocated to and the quantity sought to be acquired by the licensee. Such an approach may not have been particularly practical when the Commission was still in the process of auctioning PCS spectrum. At that time a cap was likely the easiest means of protecting the public from the accumulation of undue market

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62 See 47 C.F.R. § 24.709 (Broadband PCS license Blocks C and F reserved for entrepreneurs, including small businesses).

63 See, e.g., Notice at ¶ 35-36.

64 Notice at ¶ 5.

power while the major PCS spectrum auctions were being conducted. In today's wireless world, though, an inflexible spectrum cap should yield to a more tailored, case-by-case approach.

The Commission is obligated under Section 310 of the Communications Act[65] to approve transfers of control of all cellular, broadband PCS and SMR licenses. The license transfer process provides the Commission with the ability and the obligation to ensure that market issues are addressed, on a case-specific basis.

In those situations where the Commission's license transfer authority is not directly implicated, e.g., partial ownership limits conveying less than control, there are still other regulatory mechanisms that the Commission may rely upon. Proposed mergers and acquisitions generally are subject to Sections 1 (contracts in restraint of trade) and 2 (monopolizing, or attempt to monopolize) of the Sherman Act[66] and Section 7 (stock and asset acquisitions the effect of which may be substantially to lessen competition or to tend to create monopolies) of the Clayton Act.[67] Certain proposed acquisitions of less than controlling interests are still subject to such antitrust scrutiny.

While CTIA does not think it necessary, if the Commission is concerned about transactions that do not reach the Section 310 threshold for prior approval, it could require parties making filings pursuant to the Hart-Scott-Rodino Antitrust Improvements Act of 1976 ("HSR")[68]

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65 47 U.S.C. § 310(d). Issues associated with attribution of CMRS carrier ownership would be subsumed into the § 310(d) assessment.

66 15 U.S.C. § § 1-2.

67 15 U.S.C. § 18.

68 15 U.S.C. § 18a.

to similarly notify it of the imminency of the transaction.[69] The relatively low thresholds triggering the HSR notification procedures ensure that, in addition to scrutiny by Federal antitrust authorities, the Commission would have advance notice of pending transactions that potentially may raise Communications Act concerns. This would permit the Commission the opportunity to determine whether further Communications Act evaluations would be necessary under a "quick look" antitrust analysis.[70] Moreover, even if the proposed merger does not meet relevant HSR thresholds, Section 7 of the Clayton Act would still apply.[71] Thus, there are other antitrust alternatives available that render reliance upon a cap unnecessary.[72]

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69 Consistent with HSR premerger notification procedures, parties are generally obligated to notify Federal antitrust authorities of transactions (1) affecting interstate commerce, (2) where one party has annual sales or assets or at least $100 million and the other party $10 million, and (3) the acquiring party holds (a) voting securities or assets worth in the aggregate more than $15 million, or (b) voting securities conferring control (50%) of an issuer with annual sales or total assets greater than or equal to $25 million.

70 Or, the Commission could let other agencies review competition issues. To the extent that the Commission's cap is based upon an HHI market concentration analysis, its efforts are duplicative of those of other branches of the Federal Government.

71 Section 7 is also implicated by proposed non-controlling interests.

72 In addition, as part of its statutory obligations, the Commission files with Congress each year a report detailing the competitive market conditions for CMRS, including whether or not there is effective competition and whether certain competitors have a dominant market share. The Commission complies with this annual reporting obligation now based on public materials, including SEC filings, carrier press releases and securities analyst reports. The Commission appears satisfied that the information it has gathered presents a relatively accurate picture of the competitiveness of the market. Given the Commission's ongoing obligation to keep abreast of CMRS market developments, there is every reason to believe that normal monitoring activities will provide the Commission with accurate detection mechanisms to assess competitive developments.

V. CONCLUSION

For these reasons, CTIA respectfully requests that the Commission adopt the proposals made herein to forbear from or repeal in its entirety the 45 MHz CMRS spectrum cap.

Respectfully submitted,

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